84-850

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

FRANCIS A. VITELLO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Questions Presented

1. What is the standard for suppression where a wiretap order is insufficient on its face, under 18 U.S.C. §2518(10)(a)(ii)?

2. Does the standard for suppression established in *United States* v. *Giordano*, 416 U.S. 505 (1974), for "unlawful interceptions" also apply to facially insufficient warrants?

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In the
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OCTOBER TERM, 1984

No. _____

FRANCIS A. VITELLO,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Francis A. Vitello petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on September 25, 1984.

Opinions Below

The unpublished, *per curiam* opinion of the Court of Appeals for the First Circuit is appended, *infra*, at p. 15. The opinion of the United States District Court for the District of Massachusetts (Keeton, J.), also unpublished, is appended, *infra*, at p. 16.

Jurisdiction

The judgment of the Court of Appeals was entered on September 25, 1984. This Court's jurisdiction to review that judgment is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

Constitution of the United States

The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Omnibus Crime Control and Safe Streets Act of 1968

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510-2520, provides in pertinent part:

> **§ 2518. [Procedure for interception of wire or oral communications.]**
>
> . . . . .
>
> (4) Each order authorizing or approving the interception of any wire or oral communication shall specify—
>
> . . . . .
>
> (e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.
>
> . . . . .
>
> (10)(a) Any aggrieved person in any trial, hearing or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United

States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

Statement of the Case

Proceedings Below

Petitioner, Francis A. Vitello (Vitello), brought suit in the United States District Court for the District of Massachusetts under 28 U.S.C., § 1346(a)(1), seeking the refund of approximately $300,000.00 seized by the United States in partial satisfaction of wagering excise taxes assessed against him. Vitello argued that the documents used to make the assessments could not properly be received as evidence in the case, because they were the "fruit" of an illegal wiretap conducted in 1972. The government counterclaimed for approximately $1.5 million, the unpaid balance of the deficiency assessed

against Vitello. After several stipulations, the parties filed cross-motions for summary judgment.

On February 24, 1984, the United States District Judge, Keeton J., filed a Memorandum and entered Judgment for the government on Vitello's claims and for the government in the amount of $1,471,914.50 on the government's counterclaim.

The Court of Appeals for the Final Circuit affirmed, "for substantially the reasons appearing in the district court's opinion," on September 25, 1984.

FACTS

On April 24, 1972, an assistant district attorney for Suffolk County applied for and received from a state court judge authorization to intercept the wire communications of a named individual, not the petitioner, to and from a specified telephone number in the West Roxbury section of Boston. The wiretap warrant specified that the interception procedure be employed for not more than 15 days. The interception, which was begun on April 25 and conducted by Boston police, terminated nine days later on May 4, 1972. Vitello's voice was not overheard.

However, as a result of information obtained from this interception, the assistant district attorney applied for and received, on May 10, 1972, state court authorization to intercept the wire communications of other named individuals, including Vitello, to and from two specified telephones in the Roslindale section of Boston. The assistant district attorney's application sought permission to intercept communications over the two telephones for fifteen days, but the wiretap warrant issued specified no such limitation. Rather, it provided:

> "...and that such interception procedure shall not automatically terminate when the type of communication described in the Application and Affidavit has been first obtained, but shall continue until communications

are intercepted which reveal the details of said violations or the said conspiracy and the identity of participants therein and the extent of the violations and the location or locations involved therein . . ."

The assistant district attorney's application was neither attached to the May 10 warrant nor incorporated therein by reference.

Interceptions under the second warrant began on May 12, 1972, and lasted twelve days. Vitello's voice was overheard only on this second wiretap, which in turn furnished probable cause for issuance of a warrant to physically search Vitello's home on May 25, 1972.

Vitello was arrested during that search, in which voluminous gambling paraphernalia was seized.

Within one week of the seizure of Vitello's records the IRS had used them to generate asserted deficiencies and a jeopardy assessment against Vitello for $1,730,377.30 for wagering excise taxes alleged to be due for the period January 1, 1966 - April, 1972. The government stipulated that the assessments were based entirely on the seized records.

The tapes of Vitello's conversations and the physical evidence obtained in the resultant search of his home were first used at Vitello's state criminal trial on gaming charges. Suppression of the tapes and physical evidence was denied, and Vitello was convicted. *Commonwealth* v. *Vitello*, 367 Mass. 224, 229, 327 N.E.2d 819 (1975).

On Vitello's appeal to the Massachusetts Supreme Judicial Court, the state conceded that evidence obtained from sources other than the wiretap would not have been sufficient to justify the physical search.

Vitello briefed and argued to the Supreme Judicial Court the error of the trial court in denying his motion to suppress the tapes of his conversations and the physical evidence obtained in the resultant search. In "the first full review of the State wiretapping statute," *id.* at 231, the Supreme Judicial

Court expressly regarded as "serious and substantial," *id.* at 271, Vitello's claim with respect to the absence of a fixed termination date in the May 10 warrant, but rejected it on the theory that the conceded deficiency in the warrant could be cured by reference to the underlying application, which requested only fifteen days' duration for the tap. *Id.* at 271-272.

Vitello then sought *habeas corpus* relief in the United States District Court. On April 9, 1976 the District Court, Freedman, J., found the May 10, 1972 wiretap warrant to be constitutionally defective, in that its failure to contain a termination date could not be cured by reference to the assistant district attorney's application, because the application was neither attached to nor incorporated by reference into the warrant. *Vitello* v. *Gaughan*, 414 F.Supp. 26 (D.C. Mass. 1976).

The Commonwealth appealed the judgment ordering Vitello's release to the Court of Appeals for the First Circuit. While that appeal was pending, this Court decided *Stone* v. *Powell*, 428 U.S. 465 (1976), wherein it decided that *habeas corpus* relief would not be afforded to review Fourth Amendments claims already litigated in state criminal proceedings. Accordingly, Vitello could no longer invoke Judge Freedman's stated basis for granting *habeas* relief and could only urge the Court of Appeals to affirm on the theory that the omission of a termination date from the May 10, 1972, wiretap warrant also violated a federal statute, specifically 18 U.S.C., §§2518, 4(e), (5), which are Title III's provisions requiring a stated termination date and that wiretaps terminate upon attainment of the authorized objective, or in any event within 30 days. That Court reversed, holding that Vitello had not demonstrated prejudice sufficient to justify *habeas corpus* relief, *Vitello* v. *Gaughan*, 544 F.2d 17 (1st Cir. 1976). This Court denied *certiorari*, 431 U.S. 904 (1976).

In the instant civil tax proceeding, Vitello asserted that the wagering excise tax assessments against him could not stand

because the probable cause for the search, which yielded the documents upon which the assessments were entirely based, was the product of a wiretap whose warrant was *facially insufficient* under 18 U.S.C. §2518(10)(a)(ii).

After having concluded that neither of the prior decisions in the *habeas* proceedings was controlling on the issue before him, District Judge Keeton concluded that the May 10, 1972 wiretap was facially deficient in that it did not specifically identify the time period authorized, and, on its face, could be read as authorizing an intercept of longer than 30 days, *infra*. pp. 22-23, but ruled that the facial deficiency shown was insufficiently grave to warrant suppression, applying to this case the standard articulated by this Court in *United States* v. *Giordano*, 416 U.S. 505 (1974) for violations of §2518(10)(a)(i), "unlawful interception".

Judge Keeton acknowledged that he was breaking new ground:

> "Although, as Vitello notes, *Giordano* and *Chavez* concerned suppression motions under §2518(10)(a)(i), I interpret them as applicable to motions under (a)(ii) as well." *Infra*, p. 23.

In a one-sentence, *per curiam* opinion, the Court of Appeals for the First Circuit affirmed on September 25, 1984, "for substantially the reasons appearing in the district court's opinion."[1] *Infra*, p. 15.

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[1] The government had argued to Judge Keeton that even if the wiretap was illegal, the documents would nevertheless be admissible in this civil tax proceeding, citing *United States* v. *Janis*, 428 U.S. 433 (1976) and *Tirado* v. *C.I.R.*, 689 F.2d 307 (2d Cir. 1982), *cert. den.* 103 S.Ct. 1256 (1983). On oral argument to the Court of Appeals, the Government conceded that *Janis* and *Tirado* did not apply in a wiretapping context.

Reasons for Granting the Writ

Certiorari should be granted because the decision of the Court of Appeals for the First Circuit concerns an important question of federal law which has not been, but should be, settled by this Court, and because it is in conflict with a decision from the Sixth Circuit.

The district court judge relied on *United States* v. *Giordano*, 416 U.S. 505 (1974), for the proposition that facial insufficiencies in wiretap warrants of a minor nature do not require suppression. He then concluded that the facial deficiency here was of insufficient gravity to justify suppression.

Vitello respectfully submits that the decision below proceeds upon a misinterpretation of *Giordano*.

Title III, the Federal wiretap statute, 18 U.S.C. §§2510-2520, requires suppression where:

> (i) the communication was unlawfully intercepted;
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or . . .
>
> 18 U.S.C. §2518(10)(a)(i), (ii).

Giordano, supra, concerned a non-facial defect in the interception process, in that the application there appeared to have been properly authorized by an Assistant Attorney General specially designated by the Attorney General, but that person's name had in fact been signed by an improper person, the Attorney General's Executive Assistant.[2] Suppression under subsection (i), unlawful interception, had been ordered in the lower courts, and the government was arguing to this Court that approval by the wrong official is a statutory violation only, and that subsection (i) must be construed to reach constitutional, but not statutory, violations. 416 U.S. at 525-526. The government's argument ran that since subsection (i) must include some constitutional violations, and since

[2] This Court ruled that the lower court had been in error in concluding that this was also a facial insufficiency. *Id.* at 525, n.14.

subsection (ii) must reach some statutory violations without constitutional overtones, and since the latter cannot be considered "unlawful interceptions" under subsection (i) or subsection (ii) would be unnecessary, it follows that there is no basis for holding that *any* statutory violations fall within subsection (i). *Ibid.*

This Court rejected that argument, holding that subsection (i) reaches some statutory infringements as well as constitutional ones. *Id.* at 527.

It then became this Court's task to define which statutory violations are also "unlawful interceptions" under subsection (i). This Court, in that setting, held that Congress intended to require suppression, *under subsection (i)*:

> "where there is a failure to satisfy any of those *statutory* requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Giordano, supra,* at 527 (emphasis supplied).

Since, in *Giordano,* this Court accepted the arguments (1) that subsection (ii) reaches statutory violations, and (2) that it must reach statutory violations different from those reached by subsection (i), or it would be unnecessary, *United States* v. *Chavez,* 416 U.S. 562, 575 (1974), it follows that the above definition, or standard, of statutory violations reached under (i) cannot also be the definition, or standard, of statutory definitions reached by subsection (ii).

In *United States* v. *Acon,* 513 F.2d 513 (3rd Cir. 1975), the Third Circuit approached applying the *Giordano,* subsection (i), standard to a subsection (ii) case:

> "This language [from *Giordano*] does imply that paragraphs (ii) and (iii) must reach violations of some provisions of Title III which do not directly and substantially implement the congressional intent to limit use of

> wiretaps. Despite this intention to extend (10)(a)(ii) further than 10(a)(i), we do not conclude that suppression is required for every minor facial insufficiency." 513 F.2d at 517.

The district judge in the instant case took the final step toward blurring the distinction which this Court took pains to draw in *Giordano* between subsections (i) and (ii):

> "Although, as plaintiff notes, *Giordano* and *Chavez* concerned suppression motions made under §2518(10)(a)(i), I interpret them as applicable to motions under (a)(ii) as well." *Infra*, p. 23.

Vitello submits that Congress intended that suppression follow from *all* facial insufficiencies, not an unnecessarily harsh result when all that must be done to avoid that sanction is put into the warrant what Title III says to put into it. Vitello further submits that Congress' intent is controlling where the statute is unambiguous.

The argument that this Court has tolerated a middle ground by denying *certiorari*, 419 U.S. 1056 (1974), in *United States* v. *Cirillo*, 499 F.2d 872 (2nd Cir. 1974), does not bear scrutiny. In *Cirillo*, language, directing that the interception be conducted in such a manner as to minimize the interception of non-criminal conversations, was omitted from the warrant, an apparent facial deficiency. However, *Cirillo* is distinguishable from the instant case in that the Second Circuit panel addressed the issue not in terms of Title III, but rather of New York's state wiretapping statute, and drew no distinction between "unlawful interception" and "facial insufficiency."[3] Thus, there is little basis for reading into the denial of *certiorari* in *Cirillo* any revelations about what Congress meant by prescribing suppression for facial insufficiency.

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[3] The same is true of *United States* v. *Austin*, 399 F.Supp. 688 (E.D. N.Y. 1975), also cited by the district judge below.

However, even if this Court had indicated a willingness to forgive some facial insufficiencies, it certainly did not, by *Giordano*, intend to severely limit the availability of suppression in subsection (ii) situations, to:

> "...failure[s] to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Giordano*, *supra*, at 527.

A careful reading of *Giordano*, particularly 416 U.S. at 524-527, demonstrates that the district judge expressly applied the wrong standard to this subsection (ii) case.

Vitello has argued, *supra*, that *any* facial insufficiency requires suppression. If he is correct, then *United States* v. *Acon*, 513 F.2d 513 (3rd Cir. 1975), and its progeny[4] were erroneously decided. However, even if those cases were correctly decided, they do not necessarily control here. It may be possible that actual compliance with the substantive requirements of authorization by a proper official suffices to overcome a "minor" or "technical" facial defect consisting of an unauthorized person having done the ministerial act of signing the authorization. Equally, "substantial compliance" with provisions in Title III designed to result in minimization may overcome the somewhat cumulative requirement that the warrant contain a minimization directive.

There is nothing minor, technical or cumulative, however, about failing to limit the discretion of the officers executing the warrant. The omission from the warrant of a termination date, in such a manner as to affirmatively command the officers executing it to keep listening to Vitello's conversations

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[4] *United States* v. *Lawson*, 545 F.2d 557 (7th Cir. 1975) (unauthorized applicant); *United States* v. *Swann*, 526 F.2d 147 (9th Cir. 1975) (*per curiam*) (unauthorized applicant); *United States* v. *Baynes*, 400 F. Supp. 285 (E.D. Pa. 1975) (minimization language missing).

until the details and extent of the violations were ascertained, *infra*, pp. 4-5, was a failure to satisfy two of the major bases of *Berger* v. *New York*, 388 U.S. 41 (1967).

Title III was designed by Congress in direct response to *Berger* to provide the judicial supervision and procedures found lacking there.

The *Berger* Court had four major objections to the New York statute, one of which was the absence of a termination provision:

> "Third, the statute places no termination date on the eavesdrop once the conversation sought is seized", *Berger*, *supra*, 59-60.

Another of the four major concerns in *Berger* was with the general nature of wiretap warrants under the New York procedure:

> "Secondly, authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches and seizures pursuant to a single showing of probable cause." *Id.* at 59.

Congress directly addressed this Court's concern about termination dates in Title III by requiring that the wiretap warrant specify:

> "(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained." §2518(4)(e).

Congress then sought to avoid general warrants by means of §2518(5):

> "No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the

> objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective or in any event in thirty days."

Vitello submits that the omission, inadvertent or otherwise, of a termination date in such a manner as to unambiguously, affirmatively order the officers to continue eavesdropping until satisfied that they had fathomed the full extent of the violations, *infra*, pp. 4-5, resulted in an open-ended order requiring a general exploratory search. This, in turn, directly impinged upon two of the four major considerations which concerned this Court in *Berger*, *supra*. The violation was anything but "minor or technical".

It is essential to the orderly administration of justice that this Court either recognize that all facial insufficiencies require suppression, or establish a *Giordano*-like standard for facial insufficiencies which will include, at the very least, violations of the concerns addressed in *Berger*.

The decision below, in forgiving the omission of a termination date as a "minor or technical" facial insufficiency, is also in conflict with *United States* v. *Lamonge*, 458 F.2d 197 (6th Cir. 1972), where the wiretap warrant bore no date, apparently through inadvertence. Because it permitted interceptions for a period of "eight days from the date of this order,"

the Sixth Circuit Court of Appeals ruled that the absence of a date made its duration unlimited by its own terms, and apparently authorized a wiretap for an unreasonable length of time, rendering it invalid under *Berger*, *supra*.

Conclusion

Because the courts below have purported to settle an important question of federal law which has not been, but should be, settled by this Court, i.e., the standard for suppression for facially insufficient wiretap warrants, and because of the conflict with the decision of the Sixth Circuit, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

November 24, 1984

APPENDIX

United States Court of Appeals
For the First Circuit

No. 84-1320

FRANCIS A. VITELLO,
PLAINTIFF, APPELLANT,

v.

UNITED STATES OF AMERICA,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. ROBERT E. KEETON, *U.S. District Judge*]

Before
CAMPBELL, *Chief Judge*,
COWEN,* *Senior Circuit Judge*,
and BREYER, *Circuit Judge*.

Thomas C. Cameron, with whom *DiMento & Sullivan*, was on brief, for appellant.

Lisa A. Prager, Attorney, Tax Division, U.S. Department of Justice, with whom *William F. Weld*, United States Attorney, *Glenn L. Archer, Jr.*, Assistant Attorney General, *Michael L. Paup*, Attorney, Tax Division, and *Carleton D. Powell*, Attorney, Tax Division, were on brief, for appellee.

September 25, 1984

PER CURIAM. Substantially for the reasons appearing in the district court's opinion, the decision of the district court is affirmed.

* Of the Federal Circuit, sitting by designation.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NOS. 77-3913-K
77-1137-K

FRANCIS A. VITELLO,
PLAINTIFF

v.

UNITED STATES OF AMERICA,
DEFENDANT

MEMORANDUM

FEBRUARY 24, 1984

These consolidated cases come before me on cross-motions for summary judgment, in both cases. Vitello has sued to recover approximately $300,000 that was seized by the government in partial satisfaction of wagering excise taxes assessed against him. The United States has counterclaimed for approximately $1,470,000, the unpaid balance of the deficiency assessed against plaintiff.

No material questions of fact exist. Not even in alternative argument does either party call attention to any allegedly material dispute of fact. The parties do not dispute the amount of the wagering tax assessments. The only issue is the legal question whether the documents used to make the assessments may properly be received as evidence in this proceeding. The basis of plaintiff's challenge to this evidence is that it is the "fruit" of an illegal wiretap conducted in 1972.

The wiretap was conducted as part of an investigation by the Boston City Police into suspected gambling activity. On April 24, 1972, upon application of Robert Snider, then the assistant district attorney of Suffolk County, Judge Lurie of Suffolk Superior Court issued a warrant authorizing an interception lasting fifteen days. Docket No. 24, Ex. D at D-31.

Based on information obtained from this wiretap, Snider on May 10, 1972 applied for a warrant to tap two more phone numbers.

In the course of his affidavit in support of that application, Snider stated that "the interception is required to be maintained for a period of 15 calendar days. . . ." *Id.* at D-38. At this point, although the police had begun to suspect the involvement of plaintiff in the conspiracy, his voice had not been heard on the wiretap. *See* Aff. of Det. O'Malley, Ex. D. at D-44. Judge Lurie signed a warrant presented to him by Snider authorizing the wiretap of the two numbers. The warrant did not state that it would terminate in fiteen days. Instead, it stated

> that such interception procedure shall not automatically terminate when the type of communication described in the Application and Affidavit has been first obtained, but shall continue until communications are intercepted which reveal the details of said violations or the said conspiracy and the identity of participants therein and the extent of the violations and the location or locations involved therein. . . .

Snider's affidavit filed in support of the government's motions for summary judgment states that the termination language that had appeared in the earlier affidavit was omitted through clerical oversight and that he failed to notice the error because of time pressures. Snider Aff., Ex. E at E2-3. This position is also supported by the opinions of the Supreme Judicial Court in *Commonwealth* v. *Vitello*, 367 Mass. 224, 327 N.E.2d 819, 846 and the First Circuit in *Vitello* v. *Gaughan*, 544 F.2d 17 (1st Cir. 1976), *cert. denied* 431 U.S. 904 (1977). It is an undisputed fact that the wiretaps authorized by this warrant actually began on May 12, 1972 and lasted 12 days. The wiretaps produced evidence against Vitello which provided probable cause to search his home. That search was conducted on May 25, 1972. During that search, various incriminating items, including the documents on which this deficiency assessment was based, were seized.

Vitello was tried and convicted for several violations of the state gaming laws. That conviction was affirmed by the Supreme Judicial Court in *Commonwealth* v. *Vitello*, 327 N.E.2d 819. In that appeal, plaintiff asserted that the May 10 warrant was invalid because of the lack of a definite termination date. The Supreme Judicial Court referred with approval to the findings of the trial judge that this omission was an unintentional product of "error and inadvertence," 327 N.E.2d at 846, and concluded that the warrants were valid. It reasoned that since the supporting affidavit had specified a 15-day limit, the warrant, if read in conjunction with this affidavit, was properly limited. *Id.*

Vitello then filed a petition for habeas corpus in this district, raising once again the issue of the termination date. Judge Freedman found that the Supreme Judicial Court's conclusion that the warrant and the affidavit could be read in conjunction was contrary to federal law. Because he concluded that the warrant was invalid, he granted Vitello's petition. *Vitello* v. *Gaughan*, 414 F. Supp. 26 (D. Mass. 1976). On appeal, this ruling was reversed. *Vitello* v. *Gaughan*, 544 F.2d 17. The Court of Appeals stated: "We hold that whether or not the state court erred, as a matter of federal law, in reading the warrant and application together, petitioner is not entitled to release since the error, if any, was not prejudicial." *Id.* at 18. In context, however, the First Circuit decision cannot fairly be read as holding that admission of the fruits of the wiretap did not affect the outcome of the criminal proceeding. Indeed, it has been obvious throughout all these related proceedings that exclusion of the documents seized as a result of the search warrant obtained on the basis of the wiretaps would have decisively altered the outcome. The holding of the First Circuit was, instead, that error, if any, either as to the stated basis of the Supreme Judicial Court's decision (reading the warrant and application together) or as to the clerical mistake in omitting to state a limit on the duration of the wiretap was not

prejudicial. It is clear that the First Circuit held that federal law did not require exclusion of the documents in question in the state criminal proceedings.

A different legal issue is presented here. Does federal law require exclusion of the documents in question in federal tax proceedings?

The government argues that plaintiff is collaterally estopped from challenging the legality of the wiretap warrant by virtue of the adverse ruling in *Commonwealth* v. *Vitello*, 327 N.E.2d 819. The ruling there was, however, on a legal issue different from the one before me now. Likewise, Vitello's argument that Judge Freedman's holding is decisive here must be rejected because his ruling was on a legal issue different from that now before me. Moreover, his ruling could not have preclusive effect for the additional reason that his judgment was reversed. The grounds of the First Circuit decision cannot properly be interpreted as leaving Judge Freedman's determination binding on the parties.

I.

The first question I consider is whether I should suppress the challenged evidence were I to conclude that there was a violation of federal law.

The government argues that because the alleged defect was caused by the action of state officials, the evidence need not be suppressed in unrelated federal proceedings under the authority of *United States* v. *Janis*, 428 U.S. 433, *reh. denied* 429 U.S. 874 (1976).

I reject this argument as inconsistent with the relevant language of the federal wiretap statute.

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence *in any trial, hearing or other proceeding* in or

> before any court...of the United States...if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2515 (emphasis added). The plain meaning of this statute is that any information obtained in violation of the statute cannot be used in a federal court proceeding. Since the federal statute explicitly applies to state officials, 18 U.S.C. § 2516(2), any failure on their part to conform to the statute violates the federal law and makes evidence so obtained inadmissible.

It is true that evidence obtained by state officials in violation of the Fourth Amendment may, under *Janis*, be used in federal proceedings if no federal officials were involved in the illegality and if the offending state officials were not motivated by a desire to obtain evidence for federal use. This is so because the purpose of the judicially-created exclusionary rule is to deter officials from violating the Fourth Amendment. The Supreme Court had found that forbidding the federal government from using such evidence does not significantly deter the conduct of state officials.

However, the exclusionary rule of Title III was framed by Congress with more than deterrence in mind. Section 2515 was passed "not only to protect the privacy of communications, but also to insure that the courts do not become partners to illegal conduct." *Gelbard* v. *United States*, 408 U.S. 41, 51 (1972); *In re Harkins*, 624 F.2d 1160, 1166 (3d Cir. 1980). Further, Congress was concerned about "electronic surveillance, as an insidious invasion of privacy to be singled out for special scrutiny and safeguards." *In re Lochiatto*, 497 F.2d 803, 807 (1st Cir. 1974).

The fact that this notion of "preserving judicial integrity" is no longer the primary focus in determining the applicability of the exclusionary rule does not govern the interpretation of § 2515. In cases of suppression of wiretap evidence. "[t]he issue does not turn on the judicially fashioned exclusionary

rule aimed at deterring violations of Fourth Amendment rights, but upon the provisions of Title III. . . ." *United States* v. *Giordano*, 416 U.S. 505, 524 (1974). The Court cited legislative history, which states that, even though Congress did not intend "to press the scope of the suppression role beyond present search and seizure law," it did intend § 2515 to "apply across the board in both Federal and State Proceeding[s]. . . And it is not limited to criminal proceedings. Such a suppression rule is necessary and proper to protect privacy." S. Rep. No. 1097, 90th Cong., 2d Sess., 96, 106 (1968), quoted in *Giordano*, 416 U.S. at 528 n.17. The *Janis* decision, limiting the reach of the exclusionary rule, came after the passage of Title III. A judicially-defined limitation on a judicially-created rule does not apply to a separate, statutorily-mandated exclusionary rule, which was based on considerations and policies particularly relevant to the question of wiretap use.

Congress has framed statutory limits on the use of electronic surveillance that are in some respects more stringent than those imposed by the Fourth Amendment. For instance, § 2515 expressly applies to grand jury proceedings, although the Fourth Amendment exclusionary rule does not. *United States* v. *Calandra*, 414 U.S. 338, 355-56 n.11 (1974). Thus, I conclude that if the state officials violated Title III and the evidence relied on by the government here is the "fruit" of that illegality, I will be required to suppress the evidence in question.

II.

I turn now to the substantive legal question presented by the cross-motions for summary judgment in these consolidated cases. That question is whether the omission of a termination date from the wiretap warrant violated Title III in such a way as to mandate suppression of the fruits of that warrant.

The relevant statutory provisions state that each order authorizing interception "shall specify . . . the period of time during which such interception is authorized, . . ." § 2518(4)(e). Further, this statute states that "[n]o order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days." § 2518(5). An aggrieved person may seek to suppress evidence obtained from a wiretap if "(i) the communication was unlawfully intercepted; [or] (ii) the order of authorization or approval under which it was intercepted is sufficient on its face. . . ." § 2518(10)(a).

I conclude that the interception was not "unlawfully" conducted within the meaning of § 2518(10)(a)(i). The interception lasted only 12 days, well within the statutory limit. Further, I conclude that there is no basis in any available evidence for finding that Judge Lurie intended to authorize an interception longer than that permissible under § 2518(5). The application only requested a 15-day warrant and the earlier warrant had only authorized a 15-day intercept. I note the state trial court also found that Judge Lurie was unaware of the absence of a time limit in the warrant when he signed it. *Commonwealth* v. *Vitello*, 327 N.E.2d at 846. Also, I conclude that there is no basis in any available evidence for finding that the state officials seeking the warrant intended to or did mislead the judge about the nature of the intercept he was authorizing. Also, I note that at the time Snider applied for the warrant, he would have had every reason to believe that a 15-day intercept would be sufficient. The first wiretap, lasting only 9 days, had intercepted numerous incriminating conversations emanating from the two phone numbers which were covered by the second warrant.

As to the facial sufficiency of the warrant, I conclude that the order is deficient in that it does not specifically identify the time period authorized and, on its face, could be read as

authorizing an intercept of longer than 30 days. However, suppression does not automatically follow from this conclusion. Suppression is not required for every facial insufficiency. *United States* v. *Acon*, 513 F.2d 513 (3d Cir. 1975); *United States* v. *Cirillo*, 499 F.2d 872 (2d Cir.), *cert. denied* 419 U.S. 1056 (1974). I must proceed to consider the gravity of the facial insufficiency in this case.

The Supreme Court has determined that suppression is required "where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *United States* v. *Giordano*, 416 U.S. 505, 527 (1974). *See also United States* v. *Donovan*, 429 U.S. 413, 433-34 (1977). The Court gave an example of the application of that rule in *Giordano's* companion case, *United States* v. *Chavez*, 416 U.S. 562 (1974). In *Chavez*, the warrant violated § 2518(4)(d) in that it misidentified the person who had authorized the application for the warrant. The Court, however, in part relied on the fact that the application had actually been authorized by an official with statutory powers to do so. This compliance with the substantive requirements of Title III was a critical consideration in determining not to suppress. Although, as plaintiff notes, *Giordano* and *Chavez* concerned suppression motions made under § 2518(10)(a)(i), I interpret them as applicable to motions under (a)(ii) as well. *See Acon*, 513 F.2d at 517.

Courts have found on numerous occasions that technical violations of Title III do not warrant the extreme remedy of suppression. For instance, facial errors in identifying the person authorizing application for the warrant have not led to suppression when there has been actual compliance with the substantive requirements of authorization by a proper official. *United States* v. *Lawson*, 545 F.2d 557, 62 (7th Cir. 1975); *United States* v. *Swann*, 526 F.2d 147, 149 (9th Cir. 1975) (*per curiam*); *Acon*, 513 F.2d at 517.

Other courts have determined that where a warrant does not contain sufficient language directing officials to minimize interceptions of conversations not relevant to the investigation, this does not automatically mandate suppression. *United States* v. *Cirillo*, 499 F.2d at 879; *United States* v. *Baynes*, 400 F. Supp. 285 (E.D. Pa. 1975); *United States* v. *Austin*, 399 F. Supp. 698, 701 (E.D.N.Y. 1975). In these cases, the courts found that because the agents conducting the wiretap had in fact properly minimized interception of irrelevant conversations, they had been in "substantial compliance" with the statute.

In addition to considering the conformity of the government's actions with the substantive requirements of Title III, courts have looked to other factors in determining whether suppression is warranted, chiefly the prejudice to the persons subjected to the intercept and the good faith of the government. *See, e.g., United States* v. *Caggiano*, 667 F.2d 1176, 1179 (5th Cir. 1982) (*per curiam*); *United States* v. *Chun*, 503 F.2d 533, 542 (9th Cir. 1974).

In applying all these considerations to this case, I conclude that suppression is not warranted. I recognize that § 2518(5)'s limitation on the length of the interception is clearly an important, substantive aspect of the statutory scheme. Without doubt, if the intercept had lasted longer than the 30 days permitted by statute, and proper extensions had not been obtained, then suppression would be warranted. Similarly, if state officials had sought or Judge Lurie had granted, an order that in fact authorized an intercept for longer than was statutorily permissible, suppression would be a proper remedy. But the undisputed circumstances of this case do not present those issues. Instead, the only violation that could be found on the evidence in this case is the facial insufficiency of the order and the warrant—the fact that, because of inadvertence, the order and warrant lacked notice that the judicial authorization to conduct the intercept terminated after 15 days.

I conclude under the circumstances that this omission of a specific time limit from the face of the warrant did not violate a substantial requirement of Title III. The actual conduct of the wiretap was in all ways proper. The intercept terminated well within both the outside time limits imposed by the statute and the shorter limit which Judge Lurie intended to authorize. Also, as noted earlier, there was no real tactical advantage in seeking an open-ended warrant because the government could reasonably have expected that the objects of the intercept would be achieved within 15 days.

Further, I conclude there was no prejudice to Vitello from the error. Since he was not entitled to learn of the terms of the warrant until after the intercept ended, § 2518(8)(d)(2), he cannot maintain that the error denied him any information about the authorized intrusion on his privacy. *Compare In re Application of Lafayette Academy*, 610 F.2d 1, 5 (1st Cir. 1979) (specificity required in warrant to search place in order to inform owner of the scope of the authorization at time search was executed). Secondly, plaintiff was not legally entitled to have the intercept limited to any period shorter than the 30 days authorized by statute. His rights under the statute were thus not violated. *United States* v. *Carubia*, 377 F. Supp. 1099, 1107 (E.D.N.Y. 1974).

The only prejudice plaintiff claims is that Judge Lurie might have intended to authorize an intercept for a period shorter than the 15 days requested. Docket No. 29 at 9. No evidence is proffered, however, to support such a speculation. Indeed, if Judge Lurie had intended to alter the time limit from that requested by Snider and authorized in the earlier warrant, he would no doubt have considered the section of the warrant dealing with time limitations before signing it and thus would have discovered the omission.

The only danger arising from the warrant's failure to state specifically the time limitation is that the judicial order does not on its face notify the executing officers of the scope of their

authority to intercept. One of the principal functions of a warrant is to "circumscribe the discretion of the executing officer." *Lafayette Academy*, 610 F.2d at 5. In this case, however, I conclude that the danger of unbridled discretion arising from the omission was minimal and in any event did not materialize. There is no basis in evidence for a finding that the officers executing the second warrant operated under the belief that they were authorized to maintain the tap for longer than 15 days. This is particularly true because of the short time period elapsing between the signing of the two warrants and the overlap of investigative personnel involved in both intercepts. Detective O'Malley, who swore out affidavits in support of both warrants and who cooperated with Snider on the application, participated in the interception process, *Commonwealth* v. *Vitello*, 327 N.E.2d at 847 n.27. He thus knew that a 15-day warrant was applied for and intended.

More importantly, the omission of a definite time limit, unlike the overbroad description of documents to be seized in *Lafayette Academy*, is not the kind of insufficiency which invited abuses of discretion by executing officers. Had the officers taken advantage of the omission by extending the intercept longer than 15 days, that abusive conduct would have been easily detected. I note that, in this respect, the facial insufficiency of the warrant presented here is less problematic than the omission of specific minimization language in the warrants upheld in *Cirillo* and *Baynes*. Minimization language is obviously required to circumscribe police activity and prevent the warrant from being an unconstitutional "general warrant." Yet, in those cases, even though minimization language was omitted, the courts looked to the actual circumstances of the case, including the compliance with the substantive provisions of the statute, to determine if suppression were warranted.

In conclusion, I emphasize the narrowness of this holding. The fact that I do not suppress this evidence does not in any

way condone inadvertence by law enforcement officials or minimize the need for scrupulous government conduct in the highly sensitive area of electronic surveillance. As the Supreme Court has noted, "strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought." *Chavez*, 416 U.S. at 580. I have rested my conclusions here on the undisputed facts that the omission was a technical, clerical error that was not intended by the officials in charge and did not realistically benefit their activities; that, in all other respects, the investigating officers acted in strict compliance with applicable law; and that plaintiff's rights were not prejudiced in any discernible way by the error. Were any of these factors missing, a contrary conclusion might well have been reached.

Therefore, I conclude that summary judgment must be granted on behalf of the defendant.

(s) ROBERT E. KEETON
UNITED STATES DISTRICT JUDGE

United States Court of Appeals
For the First Circuit

No. 84-1320

FRANCIS A. VITELLO,
PLAINTIFF, APPELLANT,

v.

UNITED STATES OF AMERICA,
DEFENDANT, APPELLEE.

JUDGMENT
ENTERED: SEPTEMBER 25, 1984

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The decision of the district court is affirmed.

By the Court:
FRANCIS P. SCIGLIANO, *Clerk*.

[cc: Mr. Cameron and Ms. Prager.]